

No. 75-1032

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

GERARD P. TROTTA, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, pp. 12a-21a) is reported at 525 F. 2d 1096. The opinion of the district court (Pet. App. A, pp. 1a-11a) is reported at 396 F. Supp. 755.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1975. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on December 22, 1975 (Pet. App. C, pp. 22a-23a). The petition for a writ of certiorari was filed on January 21, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging petitioner with unlawfully affecting interstate commerce by knowingly and willfully demanding and obtaining money from an engineering firm for the benefit of a Republican committee, with the firm's consent to the payment having been induced by petitioner under color of official right, charges a violation of the Hobbs Act, 18 U.S.C. 1951.

2. Whether, if the indictment charges a violation of the Hobbs Act, the application of that Act to petitioner under the circumstances of this case violates due process.

STATUTE INVOLVED

The Hobbs Act, 18 U.S.C. 1951, is set forth at Pet. App. D, pp. 24a-25a.

STATEMENT

On October 31, 1974, a grand jury impanelled in the Eastern District of New York returned a second superseding indictment (Pet. App. E, pp. 26a-29a) charging petitioner with two counts of extortion under the Hobbs Act, 18 U.S.C. 1951. The indictment alleged that petitioner, while Commissioner of Public Works of the Town of Oyster Bay, Long Island, unlawfully affected interstate commerce by "knowingly and willfully" demanding and inducing payments of \$2,000 (count 1) and \$1,000 (count 2) in political contributions to the local Republican Committee from the engineering firm of William F. Cosulich Associates ("Cosulich"). The indictment further alleged that the consent of Cosulich to these payments was induced by petitioner "under color of official right." These charges were prefaced by allegations that, during the relevant periods, Cosulich provided engineering services to municipal corporations including Oyster Bay, and that petitioner, as Commissioner of Public Works, was authorized to retain

engineering firms for town projects and to monitor their performance. The indictment also alleged that Cosulich reasonably understood that petitioner "had * * * the power to take action which could adversely affect [Cosulich] in obtaining and performing contracts with the Town of Oyster Bay * * *."

Petitioner moved in the district court to dismiss the indictment on the ground that it failed to allege with sufficient specificity all of the facts necessary for a conviction under the Act. The district court granted the motion (Pet. App. A, p. 11a). It held that the indictment failed to charge "the key essential element [of extortion] — actions or words by the alleged extortioner which induce a reasonable compulsion in the victim to submit to the extortioner's demand" (Pet. App. A, p. 8a). The district court reasoned that an indictment charging extortion "under color of official right" must also allege a specific "corrupt use" of office by the public official (Pet. App. A, pp. 9a, 11a), because "[t]he words 'wrongful use of' in the statutory definition, §1951(b)(2), must be read in conjunction with 'under color of official right' * * *" (Pet. App. A, p. 10a).

On the government's appeal, the court of appeals reversed and remanded the case for trial (Pet. App. B, p. 21a). The court noted that the indictment charged petitioner in the terms used by the statute, and was otherwise specific as to the time, place and amounts of the payments (Pet. App. B, pp. 17a-18a). The court held that the indictment charged an offense under the Hobbs Act because (Pet. App. B, p. 18a)

the phrase "under color of official right" as used in §1951 has an historically recognized and accepted meaning which, taken together with the rest of the indictment, makes it clear that [petitioner] is charged with using the power of his office over Town engineering contracts to induce payments of money from Cosulich which [petitioner] had no right to receive. [Footnote omitted.]

The court of appeals rejected the contention that an indictment under the Hobbs Act must allege a specifically identifiable misuse of office. The court noted that the use of the public office to procure payments of money not owed to the public official "is, in itself, the misuse of the office; and * * * it does not matter whether [petitioner] 'induced payments to perform his duties or not to perform his duties' " (Pet. App. B, p. 21a, quoting from *United States v. Braasch*, 505 F.2d 139, 151 (C.A. 7), certiorari denied, 421 U.S. 910).

ARGUMENT

1. This petition challenges the court of appeals' reversal of the district court's pre-trial dismissal of the indictment. That reversal puts petitioner in the same position as if the district court had ruled against him in the first instance; such a ruling would not have been subject to interlocutory appeal. See *Cobbledick v. United States*, 309 U.S. 323. Similarly, review now by this Court of the court of appeals' decision here would be premature. At trial petitioner may be acquitted, in which case his claim will be moot. If, on the other hand, petitioner is convicted and the conviction is affirmed, he will then be able to present all his contentions to this Court by way of a petition for certiorari seeking review of the final judgment.

2. In any event, the court of appeals properly rejected petitioner's contentions.

a. Petitioner contends (Pet. 5-6) that an indictment under the Hobbs Act for extortion under color of official right must allege a specifically identifiable misuse of office. Petitioner is contending in essence that the indictment must allege a specific actual or a promised exercise (or forbearance from the exercise) of official power as the inducement for the relinquishment of property. This

contention is incorrect; although the inducement constituting extortion under color of official right may include a *quid pro quo* arrangement, such an arrangement "is not an essential element of the crime" (Pet. App. B, p. 21a).

The Hobbs Act defines extortion, in relevant part, as "the obtaining of property from another, with his consent, induced * * * under color of official right." 18 U.S.C. 1951(b)(2).¹ Under this definition, it is enough that the public office held by the one who demands payment "provides the coercive impetus which generates the payment." *United States v. Staszczuk*, 502 F.2d 875, 883 (C.A. 7) (concurring opinion of Judge Campbell), reversed in part on other grounds (*en banc*), 517 F.2d 53 (C.A. 7); see *United States v. Hathaway*, C.A. 1, No. 75-1352, decided March 24, 1976; *United States v. Kuta*, 518 F.2d 947 (C.A. 7), certiorari denied December 8, 1975 (No. 75-307); *United States v. Price*, 507 F.2d 1349 (C.A. 4). The pressure exerted by a public official's demand for payment "under color of official right" is itself the "misuse of office" prohibited by the Hobbs Act.²

¹This is the definition of extortion as it was known at common law (see *United States v. Kenny*, 462 F. 2d 1205, 1229 (C.A. 3), certiorari denied, 409 U.S. 914), where "a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion." *United States v. Nardello*, 393 U.S. 286, 289. Petitioner asserts (Pet. 5), without discussion or analysis, that the decision below conflicts with *United States v. Sutter*, 160 F. 2d 754 (C.A. 7). However, *Sutter* involved the construction of a different statute, 18 U.S.C. 872.

²As Mr. Justice Clark stated in *United States v. Braasch*, *supra*, 505 F.2d at 151:

It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his

In the instant case, the indictment charges that petitioner knowingly and willfully used his official power over the town's engineering contracts to induce from Cosulich payments of money to which petitioner was not entitled. These allegations are sufficient to state an offense under the Hobbs Act.³ As the court of appeals concluded (Pet. App. B, p. 21a):

[T]he pressure exerted by [petitioner] by means of the power of his public office to induce the payment of the money is, in itself, the misuse of the office; and, as stated in *Braasch, supra* [505 F.2d at 151], it does not matter whether [petitioner] "induced payments to perform his duties or not to perform his duties." Nor does it matter that the payments may have been induced simply by assertion of power or pressure stemming from [petitioner's] position as a public official. *United States v. Price [supra]*. To repeat, it is the use of the power of the public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense. This was adequately alleged; and we, therefore, hold that the indictment is sufficient on its face.

duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of 18 U.S.C. §1951.

³As the court of appeals noted (Pet. App. B, p. 15a, n. 2), "[t]hat the direct benefit of the money paid went to the Republican Committee rather than to [petitioner] does not lessen [petitioner's] culpability under the statute." See *United States v. Green*, 350 U.S. 415, 420.

b. Petitioner also contends (Pet. 6-9) that the Hobbs Act should not be applied to demands for political contributions since the fund-raiser is pursuing a "socially legitimate end" (Pet. 7). In support of this contention, petitioner cites *United States v. Enmons*, 410 U.S. 396, in which the Court held that the use of violence or force by union workers to obtain higher wages was covered by the Hobbs Act only if the workers had no lawful claim to the property. But *Enmons* does not help petitioner.⁴ There, the Court rejected, in the context of labor relations, the argument that the Act "reaches the [wrongful] use of violence to achieve legitimate union objectives * * *," since "[i]n that type of case, * * * the workers [are demanding] the wages to which they are entitled in compensation for their services" (410 U.S. at 400).⁵ Here, in contrast, the very essence of the charge is that petitioner under color of official right is demanding property to which he has no lawful claim. Fund raising for one's political party is a legitimate activity, but under the Hobbs Act the demanding of such contributions under color of official right is a "wrongful" taking of * * * property" (*ibid.*).

⁴*Enmons* considered a indictment charging the type of extortion defined in the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear * * *." The Court read the word "wrongful" in that definition to limit coverage of the Act to use of force, violence, or fear for the "wrongful" taking of property. Here the indictment charges "induce[ment] * * * under color of official right," a definition of extortion in the Hobbs Act in which the word "wrongful" does not appear. Contrary to the district court in the instant case (Pet. App. A, p. 10a), the structure of the statute's definition of extortion precludes reading "wrongful" in conjunction with "under color of official right." See Pet. App. B, pp. 17a-18a, n. 5.

⁵In reaching this conclusion, the Court relied on specific legislative history dealing with labor union activities. 410 U.S. at 401-408.

Thus, contrary to petitioner's position (Pet. 6, 8), the Hobbs Act does not threaten public officials engaged in legitimate political fund raising. Inherent in the phrase "under color of official right" is the requirement that the public official be shown to have acted with specific intent.⁶ The indictment at issue here specifically alleges the requisite *scienter*; it charges petitioner with "knowingly and willfully" obtaining money from Cosulich "under color of official right." Petitioner (and any other person similarly indicted) could therefore be convicted under the Hobbs Act only if the trier of fact finds that he acted with this guilty state of mind.

3. Petitioner also contends (Pet. 7-9) that the application of the Hobbs Act in this case is unconstitutional, principally because petitioner was not given fair warning that his conduct was prohibited. This contention is based in part on his erroneous characterization of the government's position as to what is prohibited and what state of mind the government must show in order to convict. Moreover, this argument is premature, since we do not yet know what the evidence will show as to petitioner's acts and state of mind or how the jury will be instructed. A challenge to the constitutionality of a statute as applied to specific conduct cannot, in short, feasibly be determined in advance of trial, particularly when, as here, the indictment charges the offense in the language of the statute.

⁶As the district court pointed out (Pet. App. A, p. 10a), at common law the "terms 'under color of office' and 'under color of official right' are technical expressions implying bad faith, corruption or breach of duty" (citing 3 Wharton, *Criminal Law* §1394 (Anderson ed. 1957); R. Perkins, *Criminal Law* 371 (2d ed. 1969)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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